

1 STEWART

2 A That's another sort of tricky
3 one. I guess you could call it another
4 verse, but it's also kind of the outro
5 or ending.

6 Q So would you call either the
7 outro or --

8 A An ending that is based kind
9 of on the verse and it just kind of
10 repeats to the end.

11 Q Thank you.

12 If you look at Page 5 of the
13 Ferrara report.

14 If you look at the structure
15 of Thinking Out Loud that Dr. Ferrara
16 has written at the bottom of Page 5.

17 Do you see that?

18 A Yes.

19 Q I'm going to read to you what
20 you have just told me is the structure
21 of the deposit copy of Let's Get It On,
22 and I'd like you to compare it to the
23 structure of Thinking Out Loud as
24 charted by Dr. Ferrara.

25 So you have told me that it's

1 STEWART

2 verse 16 bars, chorus 16 bars, verse 16
3 bars, verse 16 bars, bridge, I believe
4 you also said 16 bars. The next
5 section --

6 A The bridge, no, it was
7 longer. That first bridge in Let's Get
8 It On is longer.

9 Q You're right, 32 bars.

10 A Um-hum.

11 Q So bridge 32 bars. The next
12 section you were unclear whether you
13 would label that as a verse or a
14 chorus?

15 A Um-hum.

16 Q You had it at 32 bars. The
17 next section you had as a bridge for
18 eight bars, and then you had the outro
19 or verse for the remainder of the song?

20 A Yes.

21 Q Would you agree that the
22 structure of the Let's Get It On
23 deposit copy and Thinking Out Loud are
24 different?

25 A They have differences and

1 STEWART

2 they have similarities.

3 Q But they're different,
4 correct?

5 MR. FRANK: Asked and
6 answered.

7 Objection.

8 A There are differences and
9 there are similarities.

10 Q Well, if something has
11 differences and similarities they're
12 not the same, correct?

13 A They are not identical.

14 Q They're not even close to
15 identical, are they?

16 MR. FRANK: Objection.

17 Asked and answered.

18 You can go ahead.

19 A I have to say they have
20 similarities and differences. And I
21 think some of the similarities are
22 important. I'd be happy to tell you
23 what you they are.

24 Q I'm simply asking you if the
25 structure of the two songs is the same.

1 STEWART

2 I didn't ask you if have they have
3 similarities, I asked you if they are
4 the same structurally?

5 MR. FRANK: Objection. Asked
6 and answered.

7 Go ahead.

8 Q Are the structures of the
9 deposit copy of Let's Get It On and
10 Thinking Out Loud the same?

11 A They have important
12 similarities and they have important
13 differences.

14 Q What key is the deposit copy
15 of Let's Get It On in?

16 A E-flat.

17 Q And what key is the recorded
18 version of Let's Get It On in?

19 A E-flat.

20 Q And your transcriptions are
21 the key of D major, correct?

22 A D major?

23 Q Yeah.

24 A Yeah because I transposed
25 them to the same key for comparison

1 STEWART

2 purposes which is standard
3 musicological procedure.

4 Q And what is the basic chord
5 progression in Let's Get It On deposit
6 copy?

7 A For the verses and choruses
8 it is in the key of E-flat. Should I
9 give it to you or in the key of D or
10 using Roman numerals?

11 Q No, Roman numerals.

12 A One with the capital I
13 meaning major, three with three small
14 Is meaning minor, and then IV major, V
15 major. So I, III, IV, V.

16 Q And would I be correct that
17 the V is a V major VII?

18 A No, it's not.

19 Q So it's your testimony that
20 the deposit copy, the last chord in the
21 chord progression is not a V major VII?

22 A It would be my testimony,
23 yes.

24 Q Would you agree that the
25 basic chord progression in the Let's

1 STEWART

2 Get It On deposit copy and Thinking Out
3 Loud are not identical?

4 A They are extremely similar
5 but they are not identical.

6 Q Looking at the deposit copy,
7 the fourth chord depicted there, what
8 do you see written there?

9 A B-flat VII.

10 Q So is that not a V major VII?

11 A It's not.

12 Q What is it?

13 A It's a V dominant VII.

14 Q V dominant VII?

15 A Yes.

16 Q How would you actually notate
17 that in your report Roman Numeral wise?

18 A V-VII. Roman Numeral 5.

19 Q Roman numeral 5 like a V --
20 an upper case V with a VII.

21 Do you agree that the basic
22 chord progression in the Let's Get It
23 On deposit copy is not original to
24 Let's Get It On?

25 A These four chords have been

1 STEWART

2 used in other compositions prior to
3 Let's Get It On.

4 Q And would you agree that it's
5 a relatively common chord progression
6 that predates Let's Get It On?

7 A I wouldn't say it's that
8 common.

9 Q How common would you say it
10 is?

11 A Well, there were -- out of
12 hundreds of thousands of songs there
13 were a handful who used it. I can't
14 really -- I mean it was more than -- a
15 lot more than one. More than one and
16 certainly not --

17 Q Hundreds?

18 A I don't think so.

19 Q Dozens?

20 A I think Dr. Ferrara has done
21 a pretty good job of trying to find
22 every song that has a progression
23 that's even remotely similar and he's
24 come up with how many.

25 Q What makes you think he's

1 STEWART

2 done a pretty good job of finding every
3 song that has that progression?

4 A Well, because this is what he
5 kind of always does is try to bury us
6 with so-called prior art that he says
7 is similar.

8 Q Well, how many pieces of
9 prior art do you think are enough to
10 prove that it's not original to Let's
11 Get It On?

12 A Well, I think I already said
13 it's not original so I don't think we
14 have any issue there. I said that
15 other songs have this chord
16 progression.

17 Q So can I turn your attention
18 to Visual Exhibit E to Dr. Ferrara's
19 report?

20 A Visual Exhibit E.

21 Yes.

22 Q And do you see that this is
23 an excerpt from a guitar method book
24 called Guitar for Advanced Beginners.

25 Do you see that?

1 STEWART

2 A It's very difficult to read.
3 But, yes, it seems to say that.

4 Q If you turn the page twice
5 you can see that there's an excerpt
6 from Page 84 of this Guitar Book for
7 Advanced Beginners?

8 A Yes.

9 Q And do you see about midway
10 down -- the bottom half of the page
11 references the chord progression that
12 is at issue here.

13 Do you see that? The
14 I-III-IV-V chord progression?

15 A Yes.

16 Q And do you see the sentence
17 right above that that says by the
18 way -- well, hold on. The start of
19 that section says, we first played the
20 I-III-IV-V progression in Class VII.
21 And then I'm skipping over the next
22 sentence, is says is shows up in songs
23 like "If I Had A Hammer" by Pete Seeger
24 and Lee Hays, "Cruel to be Kind" by
25 Nick Lowe, "Ziggie Stardust" by David

1 STEWART

2 Bowe, "Good Little Girl/Bad Little Boy"
3 from Adventure Time, "Stuck on You" by
4 Lionel Richie, "Live and Let Die" by
5 the Wings, "Fun, Fun, Fun" by the Beach
6 Boys, "Crocodile Rock" by Elton John
7 and "Let's Get It On" by Marvin Gaye.

8 Do you see that?

9 A Yes.

10 Q Do you disagree with any of
11 those? Do you disagree with anything
12 in that sentence?

13 A I can't really comment on
14 that because I haven't listened to all
15 of these songs to confirm that.

16 Q And it says, by the which
17 even though Let's Get It On was
18 recorded in 1973 which is after dozens
19 of other I-III-IV-V songs were
20 recorded, I firmly believe that Marvin
21 Gaye did not plagiarize this song - he
22 was simply writing a song using a
23 common progression just like every
24 other professional songwriter does.

25 Do you see that sentence?

1 STEWART

2 A Yes.

3 Q Do you agree?

4 A First of all --

5 MR. FRANK: Which part of the
6 sentence are you asking him if he
7 agrees with? There's several
8 propositions. Whether Marvin Gaye
9 plagiarized Let's Get It On or
10 whether it's common progression
11 and every other professional
12 songwriter uses it?

13 Q Is there anything in that
14 sentence that you disagree with?

15 A Well, just on your previous
16 sentence that you read I would like to
17 say that some of these songs that are
18 listed postdate Let's Get It On, so
19 that needs to be pointed out. No, I
20 have not listened to all of them. But
21 in terms of the sentence you just read,
22 I don't think I have a problem with
23 that. I think what's unique about what
24 Marvin Gaye did was the way that he
25 expressed it -- this chord progression

1 STEWART
2 in a distinctive way. So this case is
3 not really just about abstract four
4 chords, it's about how these four
5 chords were expressed in this
6 composition.

7 Q Well, but if the -- if the
8 existence of this chord progression
9 were the only similarity that you found
10 between these two songs, would your
11 conclusion still be that the similarity
12 can only be the result of copying?

13 MR. FRANK: Objection,
14 predicate.

15 Go ahead.

16 A Could you repeat that?

17 Q Sure.

18 If the existence of this
19 similar chord progression were the only
20 similarity between these two
21 compositions, would your conclusion
22 still be that the similarity can only
23 be the result of copying from Let's Get
24 It On?

25 A Well, if it were just this

1 STEWART

2 chord progression in the abstract that
3 were the only thing in common; yeah, it
4 would not -- what was your phrase?

5 Q Well, I'm use your phrase
6 from your report which is that these
7 similarities can only be the result of
8 copying Let's Get It On?

9 A That would not be my
10 conclusion if that were the only thing.
11 And that's, again, the chord
12 progression in the abstract, just these
13 Roman numerals, not the way that it's
14 actually expressed in terms of
15 rhythmically and all the other details.

16 MS. FARKAS: Why don't --
17 it's probably a good time for a
18 break.

19 VIDEOGRAPHER: The time is
20 12:50. This is the end of Video
21 2. We're off the record.

22 (Whereupon, a lunch recess
23 was taken at 12:50 p.m.)
24
25

1 STEWART

2 A F T E R N O O N S E S S I O N

3 (Time noted: 2:00 p.m.)

4 A-L-E-X-A-N-D-E-R S-T-E-W-A-R-T,

5 Resumed, having been previously sworn by a
6 Notary Public within and for the State of New York,
7 was further examined and testified under oath as
8 follows:

9 VIDEOGRAPHER: The time is
10 2:00 p.m. We're on the record.
11 This is Video 3.

12 CONTINUED EXAMINATION BY MS. FARKAS:

13 Q Good afternoon, Dr. Stewart.

14 A Good afternoon.

15 Q You had testified earlier
16 about the June 2015 report and you had
17 testified that you had corrected or
18 made certain changes to the June 2015
19 report a few days after you transmitted
20 the report dated June 3, 2015 to
21 plaintiff's counsel; is that correct?

22 A I'm confused because I'm not
23 sure what you mean by the June 15th
24 report.

25 Q No, I said the June 2015.

1 STEWART

2 Maybe I misspoke, I will say it again.

3 A I thought it said.

4 Q I might have misspoken.

5 So we had marked a report
6 from you that was signed by you and
7 dated June 3, 2015, correct?

8 A Yes.

9 Q And you had testified
10 earlier, I believe, that you had made
11 certain changes to that report dated
12 June 3, 2015, a few days later; is that
13 correct?

14 A Yes.

15 Q And that you had sent that
16 onto plaintiff's counsel, correct?

17 A Yes.

18 Q How did you send it to
19 plaintiff's counsel, via e-mail?

20 A Well, you know, I left for
21 Europe like that same week and I recall
22 that I attached it to an e-mail right
23 before I left. And then I was kind of
24 out of touch for a couple of weeks.

25 MS. FARKAS: Well, we would

1 STEWART

2 ask for the transmittal e-mail to
3 be produced to us along with
4 whatever was sent along with it.

5 MR. FRANK: Sure.

6 Q Do you know -- I believe both
7 your June 2015 report and your
8 December 2017 report identify the
9 compensation for your preparing the
10 report and analysis at \$275 an hour; is
11 that correct?

12 A Yes.

13 Q Do you know what the total
14 compensation that you've been paid to
15 date is on this matter?

16 A I don't recall.

17 Q We have two transmittal
18 letters, the first one I had shown you
19 from April 2015 that had a \$2,000
20 payment, and I will represent to you
21 that there's a second letter that has
22 another 2000 payment sent to you.

23 Do you recall whether you
24 were paid anything more than that
25 \$4,000 on this matter?

1 STEWART

2 A I think I was.

3 Q When you send invoices are
4 they itemized in any way?

5 A I don't recall.

6 Q Do you typically send
7 itemized invoices?

8 A Yes. I mean, itemized in
9 terms of what kinds of work I was
10 doing, what the tasks were that I was
11 accomplishing.

12 Q What are some of the
13 categories of tasks that you would
14 itemize on your invoices?

15 A Transcription analysis,
16 writing the report, those kinds of
17 things.

18 Q I think you testified earlier
19 that the fourth chord on the Let's Get
20 It On deposit copy is a V 7 chord,
21 correct?

22 A Yes.

23 Q And I'd like to show you
24 what's been marked as Stewart
25 Exhibit 6.

1 STEWART

2 (Sheet music to Let's Get It
3 On, was marked Stewart Exhibit 6,
4 for identification, as of this
5 date.)

6 Q Can you identify this
7 document for us?

8 A It appears to be the sheet
9 music to Let's Get It On.

10 Q And if you look at the bottom
11 left corner of really any of the pages
12 other than the cover page, do you see
13 it says musicnotes.com at the bottom
14 left?

15 A Yes.

16 Q Does that refresh your
17 recollection as to whether that's a
18 site from which you get sheet music?

19 A That's the sight I generally
20 go to, yes.

21 Q Am I correct that the fourth
22 chord noted on the published sheet
23 music for Let's Get It On is a V 7
24 chord?

25 A Yes.

1 STEWART

2 Q And looking at the deposit
3 copy of Let's Get It On -- not the
4 sheet music, the deposit copy -- do you
5 agree that the Let's Get It On deposit
6 copy does not include drums?

7 A The drums are not notated on
8 the deposit copy.

9 Q And do you agree that the
10 base part is not notated on the Let's
11 Get It On deposit copy?

12 A The base part is implied but
13 it is not notated.

14 Q What do you mean by implied?

15 A Well, it's implied by virtue
16 of the fact that -- the deposit copy
17 shows or indicates where each chord
18 change occurs and -- so that dictates
19 where the base notes would go.

20 Q And that's common practice
21 that the chord progression would
22 dictate where the base chord -- the
23 base notes go?

24 A Rhythmically, yes.

25 Q Well, beyond rhythmically it

1 STEWART

2 also dictates the actual base notes
3 that are being played, no?

4 A Typically because the base
5 would be playing the roots of the
6 chord.

7 Q Do you know -- I'm sorry, do
8 you also agree that the Let's Get It On
9 deposit copy does not contain a guitar
10 part?

11 A Well, again, it's very
12 clearly implied with the chord changes.
13 Any guitarist could pick up guitar and
14 play the chords along with this -- from
15 this sheet music.

16 Q To the extent that the guitar
17 part is following the chords, correct?

18 A Yes.

19 Q I mean, there are
20 possibilities that there could be
21 guitar portions of songs that don't
22 follow the chords, correct?

23 A Yes.

24 Q Melodic guitar parts or other
25 types of guitar parts, correct?

1 STEWART

2 A Yes.

3 Q And none of that is notated
4 in the deposit copy of Let's Get It On,
5 correct?

6 A Yes.

7 Q Do you know who created the
8 drum part for Let's Get It On?

9 A Well --

10 Q Do you know?

11 A The indications are that it
12 was one of the session players from
13 Motown Records, one of the Funk
14 Brothers. And I forget the guy's name,
15 his nickname was Bongo. And I think he
16 was most likely the drummer, but I do
17 not know with certainty -- 100 percent
18 certainty that he was the drummer.

19 Q What are you basing your,
20 I'll call it best guess, but you'll
21 correct me if you disagree?

22 A Several things. First of
23 all, I'm somewhat familiar with the
24 history of Motown and the session
25 players that played on a lot of those

1 STEWART

2 recordings. And secondly I have looked
3 at a Wikipedia article on the song and
4 it says the Funk Brothers performed on
5 it.

6 Q Do you know who created the
7 percussion parts for Thinking Out Loud?

8 A I know from Mr. Sheeran's
9 testimony that it was -- well, first of
10 all, was your question about who
11 created the drum parts on Let's Get It
12 On or who played the drums on Let's Get
13 It On?

14 Q Well, I asked you who created
15 them.

16 A Yeah, then I'm sorry, I think
17 I needed to listen a little more
18 closely. Because I don't know if the
19 person who played the drums actually
20 came up with the drum part or if he was
21 instructed to play it by Marvin Gaye or
22 someone else. So I was talking about
23 who played the drums on the track, not
24 necessarily who came -- who contributed
25 the musical parts.

1 STEWART

2 Q So would I be correct that
3 you don't know who created the drum
4 parts for Let's Get It On?

5 A Well, it would have been
6 somebody would was there in the studio
7 that day; Mr. Townsend, Mr. Gaye or
8 maybe the drummer.

9 Q Or someone else?

10 A Yeah.

11 Q Or someone who wasn't in the
12 studio that day for all you know?

13 A Unlikely, but it's within the
14 realm of possibility.

15 Q Do you know who created the
16 percussion parts for Thinking Out Loud?

17 A Well, I heard in
18 Mr. Sheeran's testimony that it was I
19 think the father of the keyboard
20 player.

21 Q But before that did you have
22 any knowledge of who created the drum
23 parts for Thinking Out Loud?

24 A Well, again, I don't know who
25 created them but he contributed them on

1 STEWART

2 the recording according to Mr. Sheeran.

3 Q And that's your only source
4 of knowledge for that answer, correct?

5 A Is from Mr. Sheeran's
6 deposition, yes.

7 Q I'd like you to review the
8 lyrics in the deposit copy of Let's Get
9 It On.

10 A Yes.

11 Q And to distinguish the
12 deposit copy of Let's Get It On from
13 the recorded performance of Let's Get
14 It On, I'm going to refer to the
15 recorded performance as the Let's Get
16 It On RP, since that seems to be how
17 it's referred to in at least one or
18 both of the reports. Okay?

19 A Dr. Ferrara's report, yes.
20 Not in mine.

21 Q Understood. But I have to
22 pick sides and I think I need to be
23 consistent.

24 Are the lyrics in the deposit
25 copy of Let's Get It On the same as in

1 STEWART

2 the Let's Get It On RP?

3 A Okay.

4 Now we're not comparing with
5 the sheet music that you gave me a
6 minute ago. We're not calling this RP,
7 right?

8 Q No.

9 A The sheet music?

10 Q It's the work that you used
11 to render your report.

12 A I can't answer that without
13 going through the whole recording and
14 comparing it word-for-word.

15 Q On Page 12 of your report you
16 say, quote, I have found few important
17 lyrical similarities; is that correct?

18 A That's correct.

19 Q And is there anything in the
20 lyrics that you see in the deposit copy
21 that would cause you to believe that
22 you would come to a different
23 conclusion if you were to review the
24 lyrics of the deposit copy?

25 A In other words, do I -- would

1 STEWART

2 I still stand by that statement that
3 there were few similarities in the
4 lyrics between the deposit copy of
5 Let's Get It On and the recorded
6 version of Thinking Out Loud?

7 Q Correct.

8 A I see -- I mean, I've not
9 gone through this with that particular
10 focus in mind, so I can't really give
11 you a definitive answer.

12 Q But you testified earlier
13 that you reviewed the deposit copy of
14 Let's Get It On before you issued your
15 December of 2017 report, right?

16 A Um-hum. Yes.

17 Q And I believe you also
18 testified that there was nothing in the
19 deposit copy that would cause you to
20 change your December 2017 report,
21 correct?

22 A That's correct.

23 Q And so that would pertain to
24 your conclusion about the lyrics, as
25 well?

1 STEWART

2 A I have not really focused on
3 the lyrics between the deposit copy and
4 Mr. Sheeran's song. And as I'm looking
5 at it now, I mean there are a lot of
6 references to "baby" and "sugar", I
7 think there's also a sugar in
8 Mr. Sheeran's song. But I think
9 there's nothing in this that I see that
10 would cause me to radically revise that
11 statement, no. I think there may be
12 some words held in common, but I don't
13 see --

14 Q Do you think the appearance
15 of the word "baby" in two songs is
16 something that gives rise to an
17 inference of copying?

18 A No. Not necessarily, no.
19 I mean, you have it in the
20 context of other similarities, too,
21 but...

22 Q Are you saying that baby
23 doesn't appear in the recording of
24 Let's Get It On?

25 A It does. I don't know if it

1 STEWART

2 appears as frequently. Anyway, I
3 think -- rather than belabor this, I
4 don't think that I would change that
5 opinion, just to be clear.

6 Okay.

7 Q On Page 3 of your report you
8 state that, quote, both songs
9 occasionally deploy a, quote, blue,
10 closed quote, third, open paren, (a
11 third degree of the scale that ranges
12 from minor to major or somewhere in
13 between), closed paren closed quote.

14 Correct?

15 A Yes.

16 Q Do you agree that the use of
17 an occasional blue -- excuse me, the
18 use of -- let me start over.

19 Do you agree that the use of
20 an occasional blue note is not original
21 to Let's Get It On RP?

22 A I would agree with that
23 statement.

24 Q Would you agree that the use
25 of an occasional blue note was common

1 STEWART

2 before Let's Get It On RP?

3 A Yes.

4 Q Would you agree in terms of
5 pitch that an F is a different note
6 than an F-sharp?

7 A Devoid of any context, yes.

8 Q Do you -- if you can turn to
9 the deposit copy of Let's Get It On.

10 A Um-hum.

11 Q Do you see any blue notes
12 there?

13 A Yes.

14 Q Where do you see them?

15 A In the second and third
16 measure. In the fifth measure. Sixth,
17 and seventh.

18 Q Can you tell me where you see
19 it in the third measure?

20 A On the very first note there
21 is a G-flat. But the very first G at
22 the beginning of the piece is also --
23 it could be considered within that
24 spectrum. I mean, all the thirds are
25 regarded as the same toneme,

1 STEWART

2 T-O-N-E-M-E, in analysis of blues.

3 Q Looking at -- going back to
4 your report on Page 4.

5 A Yes.

6 Q Looking at Example 1.

7 A Yes.

8 Q You label that example as the
9 basic baselines in Let's Get It On and
10 Thinking Out Loud.

11 Do you see that?

12 A Yes.

13 Q And you say in your report
14 that --

15 MS. RICE: I'm sorry, which
16 report is it?

17 MS. FARKAS: His December
18 report.

19 Q You state in your report on
20 Page 5 that, quote, this is the only
21 base part heard for the first 24
22 seconds. Because it is in the
23 beginning of the song it makes a
24 lasting first impression, closed quote.

25 A Yes, I see that.

1 STEWART

2 Q Focusing on that second
3 sentence about it making a lasting
4 first impression, is that your expert
5 opinion?

6 A Yes.

7 Q And what is that opinion
8 based on? What expertise do you have
9 in what creates a lasting first
10 impression?

11 A It's based on many things.
12 It's based first and -- first of all on
13 my experience as a listener, and I know
14 that first impressions are important
15 and tend to be in clear focus because
16 it's something that a listener is
17 hearing at the outset. And I have done
18 quite a bit of reading in music
19 cognition and my readings in that
20 discipline have supported that
21 conclusion as well.

22 Q What is music cognition?

23 A It's the study of how music
24 is perceived and how mental structures
25 conceptualize musical sounds.

1 STEWART

2 Q And how is -- was there a
3 particular methodology that you
4 employed in determining that the
5 opening baseline of the only -- excuse
6 me, the opening base part of Thinking
7 Out Loud creates a lasting first
8 impression?

9 A I'm not sure I understand the
10 question.

11 Q Well, what did you do to
12 determine that it creates a lasting
13 first impression?

14 A It certainly had that effect
15 on me. I remember that -- hearing that
16 as the base part of the song.

17 Q And did you conduct any
18 surveys to determine whether that base
19 part had a lasting first impression on
20 anyone other than you?

21 A Again, I mean based on my
22 research and studying studies in my --
23 as a scholar, it's supported by
24 everything that I've done in that work,
25 as well. That first impressions are

1 STEWART

2 important and that they have a lasting
3 impression -- make a lasting
4 impression. And furthermore, I've read
5 a lot of stuff on popular music that --
6 where A&R folks, you know, that's
7 Artist and Repertoire folks in the
8 industry and producers put a lot of
9 emphasis on getting something early in
10 the song because they want to hook the
11 listener early on.

12 Q Okay.

13 A So they consider the
14 beginning of the song a very important
15 location to put material because -- for
16 that very reason, otherwise if it
17 didn't make a lasting impression why
18 would they bother to put it there.

19 Q Putting aside the general
20 proposition about that first
21 impressions are important, we're
22 talking about the this particular song.
23 And also putting aside the fact that
24 it's important -- that some A&R
25 executives think it's important to grab

1 STEWART

2 the listener early, that would apply to
3 all songs, correct?

4 A Yes.

5 Q So there's nothing particular
6 about this song that leads you to the
7 conclusion that it makes a lasting
8 first impression other than the fact
9 that it's in the beginning song?

10 A Yes. And I think that there
11 other elements at the beginning of a
12 song that make a lasting impression,
13 too.

14 Q Okay.

15 But other than your own
16 reaction to the song, and I think
17 you've identified that first
18 impressions are important and that A&R
19 executives, based on your experience,
20 like to interest the listener early, is
21 there any other methodology that you
22 use to come to this expert opinion that
23 the first 24 seconds make a lasting
24 first impression?

25 A Again, music cognition

1 STEWART

2 studies.

3 Q Did you apply a music
4 cognition study to this song?

5 A It informs everything I do
6 because I did a lot of reading of that
7 in that area in graduate school.

8 Q How do you apply music
9 cognition to come to this conclusion in
10 this song?

11 A I apply a lot of things that
12 I learned in graduate school from music
13 cognition and other areas to my
14 analysis, to my work, it's why I'm an
15 expert.

16 Q So what exactly do you do to
17 analyze a piece of music in order to
18 determine whether it makes a lasting
19 first impression? What's your -- we've
20 gone through a whole methodology that
21 you do to analyze music, that you
22 listen to it, you transcribe it, you
23 compare the notes to find similarities,
24 that's your methodology for analyzing
25 two pieces of music. Now I'm asking

1 STEWART

2 you what your methodology is for
3 determining that something makes a
4 lasting first impression?

5 A Well, I think that what I've
6 been trying to say is that a lot of
7 things that are heard at the beginning
8 of a song can make a lasting
9 impression. And so it's not the only
10 element that has that status in this
11 particular song.

12 Q But you focus -- on the first
13 24 seconds you focus on the lowest
14 notes of the guitar part, correct?

15 A As well as the other musical
16 elements.

17 Q Well, there's vocals as well,
18 correct?

19 A Yes. And they make a lasting
20 impression, too.

21 Q So what part of the first 24
22 seconds makes a lasting first
23 impression?

24 A Well, there's really only
25 three elements going on at that point

1 STEWART

2 in the song, and I think they all do.

3 Q Equally?

4 A Not necessarily.

5 Q But they all contribute to
6 making it a lasting first impression?

7 A Yes.

8 Q Based on what you've
9 described as the various factors that
10 led you to that conclusion?

11 A Yes. And, you know, when
12 listeners -- you know, I've done a lot
13 of work trying to understand the
14 reception of music in listeners, that's
15 been part of my scholarship. And, you
16 know, when you first apprehend a song
17 it's something completely new to you,
18 but then your relationship to the song
19 can change over time and you -- it's no
20 longer something new that's unfolding
21 to you and you don't know what's going
22 to happen next after a while as you
23 really get into a song and you start
24 listening for certain parts. And I
25 think that listeners in general, the

1 STEWART

2 more they listen to a song the more
3 they hear other layers that maybe they
4 didn't hear at the beginning. So the
5 relationship of a listener to a song
6 can change over time.

7 Q You later state at Page 5,
8 that most listeners familiar with Let's
9 Get It On would undoubtedly recognize
10 the similarity between the musical
11 expression in these two songs even
12 without the descending six.

13 Is this also your expert
14 opinion?

15 A Yes.

16 Q And what is -- focusing on
17 the first part of the sentence that
18 most listeners familiar with Let's Get
19 It On would undoubtedly recognize the
20 similarity, what is that opinion based
21 on?

22 A It just seems so obvious I
23 don't even know why I have to explain
24 it.

25 Q Did you conduct any survey

1 STEWART

2 evidence to see if any listeners
3 recognize the similarity?

4 A Yeah. People who've heard
5 me -- my family members who have heard
6 me working on these songs heard it, but
7 even more importantly I think you can
8 see literally hundreds of comments on
9 YouTube where there's been mashups
10 posted where people talk about hearing
11 the similarity of these two songs.

12 Q Well, your family knew you
13 were working on this case, correct, so
14 they already knew you were comparing
15 the two songs?

16 A Not necessarily. I mean,
17 they've heard the two songs being
18 played. But I would not -- I mean, the
19 family is not -- I think anybody --
20 it's just so obvious. Anybody who
21 hears these two songs back to back is
22 probably going to make that connection.
23 And --

24 Q Do you know?

25 A -- it's born out by the fact

1 STEWART

2 that in the comments that you see on
3 YouTube people say it all the time.

4 Q Well, first of all, do you
5 know how many people have heard
6 Thinking Out Loud?

7 A Probably not all of them have
8 heard Let's Get It On either, so...

9 Q But we can assume that a fair
10 percentage of them have, right?

11 MR. FRANK: Objection.

12 Predicate. Calls for --

13 A I can't really assume that
14 because -- you would hope they would.
15 But, I mean, I know Mr. Sheeran said he
16 was familiar with the song, very
17 familiar with it. But I think that --

18 Q You should read his testimony
19 then.

20 A There's project a lot of
21 young folks who are not well versed in
22 the great songs from Motown in the
23 past.

24 Q Other than your family
25 members and the comments that you saw

1 STEWART

2 online, was there any other type of
3 survey evidence that you did to
4 conclude that most listeners familiar
5 with Let's Get It On would undoubtedly
6 recognize the similarity?

7 A Well, everybody that I played
8 it for recognized it right away. I
9 played it for colleagues at work. I
10 mean, we can test that. Have I
11 conducted a survey involving hundreds
12 of thousands of people where I play the
13 two songs and ask them if they hear
14 that they're similar? No, I haven't
15 done that.

16 To my knowledge this just
17 seems so obvious that it seems
18 ridiculous to keep discussing it.
19 That's my opinion.

20 Q Are you claiming to be an
21 expert on what the lay listener would
22 hear?

23 A It's not really my job -- I
24 mean, I'm offering an opinion here, but
25 in copyright law I guess that would be

1 STEWART

2 considered the intrinsic test. As the
3 expert I'm supposed to be doing the
4 extrinsic test. So my job is to look
5 at the musical expression and compare
6 it. I'm opining that average listeners
7 too would also hear these similarities.

8 Q So that is part of your
9 opinion here?

10 A That's part of my opinion,
11 but ultimately -- at the end of the day
12 that's not what I'm hired to opine on.
13 That would be the job of the jury.

14 Q Do you agree that the base
15 guitar part does not begin until
16 approximately 24 seconds into Thinking
17 Out Loud?

18 A I would not agree with that.

19 Q I'm asking about the base
20 guitar part, not the guitar part.

21 A Yes. I understood the
22 question.

23 I don't agree with that.

24 Q Why don't you agree with
25 that?

1 STEWART

2 A Because according to
3 Mr. Sheeran there is no base guitar in
4 this song.

5 Q Well, what do you think
6 begins at approximately 24 seconds into
7 Thinking Out Loud?

8 A The drums come in and
9 keyboards.

10 Q And there's no guitar
11 playing, there's no base guitar
12 playing?

13 A Not according to Mr. Sheeran.

14 Q Well, I'm not asking
15 according to Mr. Sheeran. I'm asking
16 according to your analysis of the song.
17 You listened to the two songs and you
18 conducted an analysis of the two songs.
19 Are you amending -- do you want to
20 amend your report?

21 A Where do I say that the base
22 guitar comes in?

23 Q The part where you --

24 A Oh, yes, here. Well, no,
25 here's a reference to a base guitarist

1 STEWART

2 the could be heard and seen in a live
3 performance.

4 Q So I'm going to play for you
5 the commercially released version of
6 Thinking Out Loud. And I'm going to
7 say now at -- well, maybe you'll say
8 now at the 24 second mark. Actually,
9 no. I'm going to play it for you and
10 if you can let us know when you -- if
11 and when you hear a base guitar begin.

12 (Whereupon, the song is being played.)

13 Q That was about the first 51
14 seconds of the songs. Is it your
15 testimony that you haven't heard a base
16 guitar come into the song?

17 A No, I haven't.

18 Q What are you hearing after
19 the first 24 seconds?

20 A I told you before I'm hearing
21 keyboard and drums or drum sequence or
22 drum machine.

23 Q And you're not hearing any
24 base guitar or guitar?

25 A Guitar is present from the

1 STEWART

2 beginning.

3 Q And is the -- in -- your
4 opinion is that guitar continues after
5 24 seconds?

6 A Yes. As I stated before,
7 Mr. Sheeran was very clear that there
8 is no base guitar on the entire track.

9 Q But I'm asking about your
10 testimony and your analysis of the two
11 songs. And your opinion about
12 Mr. Sheeran's testimony -- you didn't
13 hear Mr. Sheeran's testimony until
14 after you rendered your report,
15 correct?

16 A That's correct.

17 Q Now, in Example 1 on Page 4,
18 you've only transcribed a portion of
19 the opening guitar part, correct?

20 A I'm sorry, where?

21 Q Your Example 1 on Page 4.

22 A That's correct.

23 Q Just the lowest notes?

24 A That's correct.

25 Q And nowhere in your report do

1 STEWART

2 you transcribe the full guitar part
3 that you hear in the first 24 seconds,
4 correct?

5 A That's correct.

6 Q So your testimony is that the
7 only guitar part that you're hearing in
8 Thinking Out Loud is a guitar part not
9 a base guitar, correct?

10 A Well, they're two different
11 instruments, base guitar and guitar.

12 Q I understand.

13 A So you're asking me do I hear
14 a base guitar in Thinking Out Loud?

15 Q Yes.

16 A I do not.

17 Q And you only hear guitar?

18 A That's right.

19 Q You hear a guitar throughout
20 Thinking Out Loud, correct?

21 A That's correct.

22 Q Is it your testimony that the
23 lowest guitar notes in the opening 24
24 seconds of Thinking Out Loud is the
25 baseline?

1 STEWART

2 A The lowest guitar note in the
3 opening 24 seconds is the baseline,
4 that's what you're asking me?

5 Q Yes.

6 A Yes.

7 Q And does the baseline change
8 throughout Thinking Out Loud?

9 A That's an interesting
10 question. I mean, there is an
11 additional base part that is added but
12 this base part continues on. And,
13 again, according to Mr. Sheeran, the
14 composition as he did it on his demo is
15 the composition. And that does not
16 contain any other base part except for
17 this part that's notated here.

18 Q So now is your testimony that
19 the demo is the composition?

20 A No, I'm saying as regards to
21 base part he's quite clear that --
22 that -- okay. Let me revise that.

23 He's very clear that what
24 he's playing on the demo is the
25 composition and on that you hear only

1 STEWART

2 this base part. That does not mean
3 that the base part that's added on in
4 the studio version is not part of the
5 composition, too, as it evolved; it is.

6 Q Are the lowest notes of the
7 keyboard in the first 24 seconds of --
8 sorry, at 24 seconds in on Thinking Out
9 Loud, are the lowest notes of the
10 keyboard considered the baseline?

11 A They're part of it.

12 Q What's the baseline of
13 Thinking Out Loud?

14 A It's this in Example 1.

15 Q You think that continues
16 throughout the entire song?

17 A Yes.

18 Q Without change?

19 A Well, there may be minor
20 embellishments and of course it changes
21 during the bridge or the pre-chorus or
22 whatever you call it. If I might
23 add -- or you don't like me to add, so
24 I won't.

25 MR. FRANK: Wait for a

1 STEWART

2 question.

3 THE WITNESS: Yes.

4 Q Staying on Example 1 of
5 Page 4 of your report, when you talk
6 about the baseline leaps downward by a
7 sixth?

8 A Of which page again?

9 Q Page 4.

10 A Okay. Yeah.

11 Q If you look at Example 1 on
12 Page 4, you reference the baseline
13 leaps downward by a sixth. Where does
14 that occur in Let's Get It On?

15 A Very first two base notes.

16 Q So it goes from the first to
17 the second note is what leaps downward
18 by a sixth?

19 A Yes.

20 Q What about in Thinking Out
21 Loud?

22 A The same two notes, first two
23 notes.

24 Q And you also refer to an
25 ascending stepwise interval. Where

1 STEWART

2 does that occur in Let's Get It On?

3 A Where do I say that?

4 Q In the same sentence right
5 above the Example 1.

6 A I don't use the word
7 interval. I say it ascends stepwise to
8 the fifth degree, yes.

9 Q Okay.

10 So can you tell us where in
11 Let's Get It On it ascends stepwise to
12 the fifth degree?

13 A So, yes. It goes D F-sharp G
14 A. So that the F-sharp G A is stepwise
15 motion.

16 Q And what about in Thinking
17 Out Loud?

18 A Same thing.

19 Q So it's basically the next
20 two notes?

21 A In terms of the roots, yes.
22 D F-sharp G A.

23 Q Do you agree that there is an
24 F-sharp on the second half of beat four
25 in Let's Get It On RP in Example 1?

1 STEWART

2 A Do I agree what?

3 Q That there's an F-sharp on
4 the second half of beat four.

5 A There is a pickup there that
6 leads to the next note.

7 Q And is that an F-sharp?

8 A There's a pickup of an
9 F-sharp that leads to the G.

10 Q And do you agree that the
11 F-sharp that you've just identified is
12 not on the second half of beat four in
13 the Thinking Out Loud example in
14 Example 1?

15 A That's correct. It's not
16 part of the basic baseline, it's just a
17 pickup that leads to the next note.
18 And in TOL, Thinking Out Loud, it's not
19 there.

20 Q And do agree that there are
21 two notes in the second half of beat
22 four in bar one?

23 A Of which?

24 Q Hold on.

25 You're looking at the second

1 STEWART

2 bar of Let's Get It On?

3 A In Example 1?

4 Q Correct.

5 A Yes.

6 Q Do you see that the last two
7 notes are an A and a B?

8 A There are two embellishments
9 that are varied continuously throughout
10 the entire song so it's never repeated
11 exactly the same.

12 Q Okay.

13 But it's in your Example 1,
14 correct?

15 A It is heard in that measure
16 along -- in later iterations. Towards
17 the end of this two bar phrase is where
18 the base player frequently adds
19 embellishments.

20 Q And is that embellishment in
21 Thinking Out Loud?

22 A No, but there are
23 embellishments that occur in the song.

24 Q Different embellishments?

25 A Yes.

1 STEWART

2 So, again, one compares the
3 paradigmatic to -- I could attempt to
4 spell it for you --

5 So, I mean, Dr. Ferrara in
6 his own report, I think it was probably
7 in his initial report, talks about the
8 baselines and how he didn't -- and he
9 talks about the chord parts, too, how
10 he didn't transcribe all the multitude
11 variations that are in both songs.

12 Q Okay.

13 But you have only a few
14 transcriptions in your report, correct?

15 A Yes.

16 Q You have, you know, five
17 examples in the whole thing, right?

18 A I have the representative
19 examples, yes.

20 Q And this is one of them,
21 correct?

22 A Yes.

23 Q What is the total number of
24 notes that are transcribed in Example 1
25 for Let's Get It On?

1 STEWART

2 A In Example 1?

3 Q Yes.

4 A Seven or -- eight. I can
5 count.

6 Q Better answer.

7 What are the total number of
8 notes in the Thinking Out Loud
9 transcription in your Example 1?

10 A Okay. You know, I'll answer
11 that as --

12 Q I would just like a number.

13 A The point is that there are
14 all kinds of embellishments in minor
15 tiny miniscule variations that Dr.
16 Ferrara himself has noted don't --
17 figure importantly in the analysis.
18 So, anyway, the answer is five.

19 Q Right.

20 But you've testified that the
21 first 24 seconds of Thinking Out Loud
22 is what makes a lasting impression,
23 right? Yes?

24 A Well, it's not the only thing
25 in the song that makes a lasting

1 STEWART

2 impression.

3 Q So there's lots of things in
4 the song that makes a lasting
5 impression?

6 A Of course there are other
7 things, too. If Mr. Sheeran had only
8 released the first 24 seconds I doubt
9 it would have been as huge a hit as it
10 was.

11 There are a couple other
12 notes --

13 Q There's no question pending.

14 A Oh, okay.

15 Q Do you agree that the notes
16 differ in duration in Example 1 as
17 between Let's Get It On and Thinking
18 Out Loud? For example, the total
19 duration of the second note in each one
20 is different durations, correct?

21 A No, not necessarily.

22 Q Well, what's the duration of
23 the first note -- I'm sorry, the second
24 note in Let's Get It On?

25 A Okay.

1 STEWART

2 But, you know, this is one of
3 the interesting things about doing
4 transcriptions. Because this is being
5 played on the guitar by -- Thinking Out
6 Loud by Mr. Sheeran, that second note
7 may not be sustained for the entire
8 measure. The standard practice in
9 doing these kinds of notations --
10 transcriptions is to present something
11 that is representation of the musical
12 expression and that is visually
13 coherent. And so if you've ever used
14 music notation software like a MIDI
15 hookup with a keyboard that's connected
16 to MIDI and you ask it to transcribe
17 what you play, because it's a computer
18 it doesn't put it in a really coherent
19 way. So if you play a note a
20 microsecond late then it notates it in
21 this incredibly mind boggling way as
22 like a 130 second note -- I mean a --
23 what would it be -- 128th note with
24 a -- I mean, it's just -- so this is a
25 representation of the basic baseline as

1 STEWART

2 the caption says here.

3 Q So your testimony is we
4 should ignore everything that's
5 different between the two and just
6 focus on what's the same?

7 A No. Not all, no.

8 Q Okay. Just checking.

9 A But the -- this duration
10 thing is really kind of silly. It's
11 something that --

12 Q So you think the duration of
13 a note is irrelevant for your analysis?

14 A No, it's very pertinent. But
15 when we're talking about --

16 Okay. So how long is a half
17 a beat in this particular tempo? Let's
18 see, if there are approximately 80
19 beats per minute then it would be well
20 under a half a second for half a beat.
21 So did Mr. Sheeran hold that second
22 note, the F-sharp for a full three
23 seconds or did he hold it for 3.2
24 seconds or 2.8? I mean, that's
25 irrelevant. This is a perfectly valid

1 STEWART

2 representation of the durations. So
3 the difference in the duration between
4 the second note in Let's Get It On and
5 Thinking Out Loud is less than a half a
6 second. And in the context of the
7 recording and the other musical sounds
8 that are happening concurrently with
9 that base note I think it defies the
10 expectation of anyone to have
11 transcribed the exact duration of that
12 note.

13 So these could very well be
14 exactly the same duration. What is
15 really critical here is the placement
16 of the note. The placement of the note
17 on the end of one, and that it is a
18 note that is sustained. So I'm not
19 trying to manipulate anything here,
20 this is just something that any
21 musician who is not attempting to be
22 really pedantic about all this would
23 instantly grasp. I mean drums, for
24 example, are notated using half notes,
25 but when you hit a snare drum you're

1 STEWART

2 not holding out the note for two beats.
3 It's just indicating where the drum is
4 struck.

5 Q You transcribed it, not me.
6 So I'm just trying to get a sense of
7 what you think is important and what
8 you don't think is important.

9 A I'm trying to explain to you
10 how transcription works and how -- this
11 is a very fair and accurate
12 representation of the musical sounds in
13 these recordings.

14 Q Can you turn to the Ferrara
15 report at Page 18, Musical Example 2?

16 A Yes.

17 Q Do you agree that Dr. Ferrara
18 transcribed the first two bars of Let's
19 Get It On the same as in your Example
20 1?

21 A Yes.

22 Q And you agree that you did
23 not transcribe the third and fourth bar
24 in Let's Get It On in your Example 1?

25 A Yes. Because it's exactly

1 STEWART

2 the same as the first two except, as I
3 mentioned before, it has this little
4 embellishment at the end of the measure
5 which is something that the base player
6 on Let's Get It On does frequently and
7 varies that embellishment.

8 Q So you believe that bar four
9 of Let's Get It On is the same as bar
10 two of Let's Get It On?

11 A In essence, yes.

12 Q How many notes are in bar two
13 of Let's Get It On?

14 A Oh, this is -- this is
15 totally missing the point. My
16 transcription says the basic
17 baselines -- this is the exact same
18 thing that Dr. Ferrara did in his
19 initial report, he looked at the basic
20 baselines. He -- if we tried to talk
21 about every single minuet variation
22 throughout the entire song we would
23 lose sight of what the basic baseline
24 is because we would be constantly
25 discussing the trees instead of the

1 STEWART

2 forest.

3 Q Well, I guess you and Dr.
4 Ferrara are going to have to disagree
5 on that one.

6 Can you answer my question,
7 please?

8 A Well, actually we agree
9 because he did the analysis correctly
10 in the beginning. And now he's trying
11 to find something to be rather pedantic
12 about frankly and show that there's a
13 difference where there really is not a
14 substantial difference.

15 Q Okay.

16 Well, putting your attacks on
17 Dr. Ferrara's integrity aside, can you
18 answer my question please?

19 A And that question is what?

20 Q How many notes are in bar two
21 of Let's Get It On?

22 A How many notes are in bar two
23 of Let's Get It On?

24 Q In Musical Example 2.

25 A One, two, three, four --

1 STEWART

2 five.

3 Q And how many are in bar four
4 of Let's Get It On in Ferrara Musical
5 Example 2?

6 A Seven.

7 MS. FARKAS: Let's take a
8 quick break.

9 VIDEOGRAPHER: The time is
10 2:56. We're off the record.

11 (Whereupon, a brief recess
12 was taken.)

13 VIDEOGRAPHER: The time is
14 3:08 p.m. We're on the record.

15 Q We were talking earlier about
16 what you consider to be the baseline of
17 Thinking Out Loud. And I had played
18 for you about 51 seconds of Thinking
19 Out Loud and asked you about whether
20 the baseline changed in Thinking Out
21 Loud. And I'd like to focus on around
22 24, 25 seconds into Thinking Out Loud.
23 Am I correct that a new baseline comes
24 in at that point in Thinking Out Loud?

25 MR. FRANK: If I could -- if

1 STEWART

2 I could interpose. Your exact
3 question was whether the base --
4 guitar came in, you didn't use the
5 words baseline. You used base
6 guitar.

7 Q I understand.

8 A That's what I was listening
9 for because you asked for me to
10 indicate when the base guitar came in.

11 Q Okay.

12 A And it doesn't.

13 Q And what does come in?

14 A There is an additional base
15 part the joins the base part in the
16 guitar.

17 Q And at the time that you
18 wrote your December 2017 report, did
19 you have an understanding or a belief
20 as to what instrument was playing that
21 baseline starting at 25 seconds into
22 Thinking Out Loud?

23 A I wasn't sure.

24 Q Do you have a sense now as to
25 what instrument was playing that

1 STEWART

2 baseline?

3 A I would be perfectly happy to
4 accept Mr. Sheeran's statement that
5 it's in the keyboard. I don't know why
6 it would be -- he wouldn't have any
7 reason to fabricate, he seems like a
8 very honest guy.

9 Q Yes, he does.

10 And I believe he testified
11 that it was a programmed keyboard that
12 played the baseline starting at 25
13 seconds, is that --

14 A I'm not sure he said that, I
15 would have to hear it again. But I
16 think he talked about the drums being
17 programmed, I'm not sure he said that
18 the base was.

19 Q Irrespective of what it was,
20 can we at least agree on a lingo going
21 forward that we're going to call it the
22 new baseline?

23 A The additional baseline I'll
24 agree to.

25 Q Call it the different

1 STEWART

2 baseline.

3 A How about if we compromise,
4 the new additional baseline.

5 Q Sure. We'll all reserve our
6 rights.

7 What are we calling it?

8 A What did you call it a moment
9 ago, the --

10 Q The new baseline.

11 A No, but you said another
12 term.

13 Q Well, look, let's just agree
14 that the baseline that begins at 25
15 seconds into Thinking Out Loud is
16 different from the baseline that is
17 heard in the first 24 seconds of the
18 song. Is that -- can we agree on that?

19 A It joins in along with the
20 guitar baseline.

21 Q So why don't we call it
22 Baseline B, this way we're not putting
23 any adjective on it?

24 A Sure.

25 Q So the baseline that begins

1 STEWART

2 at roughly 25 seconds into Thinking Out
3 Loud we will now refer to as Baseline
4 B.

5 Okay?

6 A And it's nice that it's a B
7 for base.

8 Q I try. Sometimes
9 unintentionally, but I try.

10 A We should have B1 and B2.

11 Q No, no, just stop. This
12 isn't cutting into my time.

13 So do you agree that Baseline
14 B in Thinking Out Loud starts at about
15 25 seconds in and continues through the
16 duration of the song?

17 A I think that that additional
18 base part does continue through most of
19 the rest of the song.

20 Q And am I correct that you do
21 not provide any transcription of
22 Baseline B in your reports; is that
23 correct?

24 A I believe I don't.

25 MR. GOLDSMITH: For the

1 STEWART

2 record, Larry got disconnected so
3 I'm going to call him back.

4 MS. FARKAS: Well, before you
5 mute Larry, have you heard
6 anything since we came back from
7 break? Larry?

8 MR. FERRARA: Yes.

9 MS. FARKAS: I'm going to
10 summarize and I'm sure I will get
11 swatted if I do this incorrectly.
12 But there is an agreement within
13 my questioning and the testimony
14 that there is a new baseline that
15 begins at about 25 seconds into
16 Thinking Out Loud, that that new
17 baseline -- that Dr. Stewart was
18 not certain what instrument was
19 playing that baseline when he did
20 his report, but based on
21 Mr. Sheeran's testimony is willing
22 to accept that it is some form of
23 keyboard programmed or not that is
24 emitting the sounds of the new
25 baseline. And for purposes of

1 STEWART

2 going forward we are calling the
3 baseline that begins at about 25
4 seconds in as Baseline B.

5 MR. FERRARA: Thank you.

6 I'll mute now. Thank you.

7 A Just one minor correction.
8 Remember, we didn't agree to call it
9 the new baseline we agreed to call it
10 the new additional baseline.

11 Q Well, we agreed to call it
12 Baseline B.

13 A Okay.

14 Q To avoid all of that.

15 A But I never agreed to the new
16 baseline --

17 Q Fair enough.

18 A -- categorization.

19 Q It's very old.

20 A Yeah. Okay.

21 Q That was sarcasm.

22 A It's too bad Dr. Ferrara
23 missed all of that, it was exciting.

24 MS. RICE: He would have
25 laughed.

1 STEWART

2 Q Turning to Musical Example 2
3 in Dr. Ferrara's report on Page 18,
4 which is what we were looking at before
5 the break.

6 A Yes.

7 Q If you look at the bars that
8 represent a transcription of Thinking
9 Out Loud beginning at about 24 seconds,
10 do you agree with Dr. Ferrara's
11 transcription of Baseline B?

12 A I can't give you an opinion
13 on that without checking it.

14 Q Why don't we play Thinking
15 Out Loud beginning at 24 seconds.

16 A I'll warn you though that
17 it's maybe kind of hard to hear the
18 base under these circumstances, but
19 I'll do the best I can.

20 Q Okay.

21 (Whereupon, the music is
22 played.)

23 A You're already passed the
24 part, so...

25 Q Go back to 24.